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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1179

CHARLES A. WRIGHT, INC.,
Petitioner,

v.

F. D. RICH CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Charles A. Wright, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on January 5, 1966.

Opinion Below.

The opinion of the Court of Appeals, reported in 354 F. 2d 710, is reprinted in the record at pages 173-180.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 5, 1966 (R. 81). A timely petition for rehearing,

filed on February 18, 1966, was denied on March 1, 1966 (R. 189). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether a plaintiff in a civil case in federal court receives a fair trial by jury where the trial judge in his charge tells the jury that he thinks the plaintiff should lose his case.

Statement of the Case.

This is a diversity suit for breach of contract, brought in the United States District Court for the District of Massachusetts.

Between February and November, 1954, plaintiff entered into eleven written contracts with defendant to do certain excavation, foundation and other work at Westover Air Force Base and Hanscom Air Force Base in Massachusetts as a subcontractor for defendant, which had the general contracts with the United States Government for construction of certain facilities there (R.A. 15). Payments under these contracts were to be made by defendant monthly on the basis of 90 per cent of the value of the work satisfactorily completed by plaintiff during the previous month (R.A. 29). During the fall of 1954 defendant stopped the monthly payments on the contracts (R.A. 19) and defendant admitted that it did not pay for extra work which plaintiff had done (R.A. 25). Plaintiff was owed its monthly payments, about $50,000, for extra work done, and there was about $50,000 of retainage money being held by defendant (R.A. 19). About this time plaintiff was coming into the winter work, which was very expensive (R.A. 19,

20). About the beginning of November, 1954, plaintiff owed a total of about $117,000, and so notified the defendant (R.A. 20).

Plaintiff, relying on *Glassman* v. *Ficksman,* 238 Mass. 580, 586, offered to show that defendant orally promised to pay $100,000 of plaintiff's bills and to pay plaintiff $50,000 and allow plaintiff to continue with the job if plaintiff would give defendant a chattel mortgage on plaintiff's machinery and equipment (R.A. 21). This evidence was excluded and an exception was taken (R.A. 21).

On December 16, 1954, plaintiff executed and delivered to defendant a chattel mortgage on its machinery and equipment and a mortgage note for $50,000 (R.A. 35-45). At the same time plaintiff and defendant entered into a supplemental agreement which stated that plaintiff had not been performing its said subcontracts in accordance with their terms and was behind in the progress of the jobs (R.A. 49). It also stated that plaintiff was "in need of financial assistance to enable it to proceed with and complete the jobs on time" and that plaintiff "is willing to and can complete the jobs to be done under said Subcontracts according to their terms and by the completion dates mentioned in the Progress Schedules" (R.A. 49). It further provided for the payment to plaintiff of a $50,000 bonus when the said subcontracts were completed (R.A. 51, par. IV). It also provided: "(III) That Rich has this day rendered and may in the future render such financial assistance by way of cash loans, advances, or otherwise, to further the completion on time of the jobs to be done by Wright under said Subcontracts as Rich in its uncontrolled discretion shall deem desirable or necessary, it being understood that such financial help as Rich may give to Wright is solely within Rich's discretion and that this agreement imposes no obligation or liability upon Rich to give such assistance" (R.A. 51).

Defendant alleged that there was no agreement to advance $50,000 to plaintiff for plaintiff's chattel mortgage (Def. R.A. 88), although defendant's subsequent letters to the plaintiff (Def. R.A. 157, 165) allege an "agreement to advance the sum of $50,000 [for the chattel mortgage]." The chattel mortgage itself stated that it was given in consideration of $50,000 paid by defendant to plaintiff (R.A. 35).

Plaintiff never received the $50,000 recited in the chattel mortgage and note (R.A. 22), and defendant admitted that, after it received the chattel mortgage, it did not pay to plaintiff directly any moneys other than for net payroll (R.A. 26).

Plaintiff continued on with the work after December, 1954 (R.A. 22), but from that time on it could not get any money from defendant (R.A. 22, 23).

In March of 1955 defendant received notice that plaintiff's insurance carrier had cancelled plaintiff's insurance (R.A. 24, 25). Defendant admitted "that we THEREFORE found it necessary to take over the work under the provisions of our contract with Charles A. Wright" (R.A. 25). (Emphasis added.) Defendant admitted in its answer that on or about March 28, 1955, defendant terminated its contracts with plaintiff on the ground that plaintiff failed to provide insurance (Defendant's Answer, par. 17, R.A. 10). However, there was no lapse in plaintiff's insurance coverage (R.A. 23) and the master found that "Under the agreement of December 16, 1954 and the conduct of the defendant thereunder it was within the power of the defendant to keep that insurance in force and in any event reasonable diligence would have shown the plaintiff had secured other coverage" (R.A. 16).

On March 28, 1955, defendant took over the jobs and plaintiff's men and equipment at Hanscom and Westover Air Force Base (R.A. 25, 23). In April, 1955, defendant

gave plaintiff back the Westover jobs (R.A. 23), but on June 15, 1955, defendant took them over again (R.A. 24), on the ground that plaintiff failed to prosecute the work with promptness and diligence (R.A. 57; Defendant's Answer, par. 20, R.A. 11, and Defendant's Answer, par. 33, R.A. 12). Defendant's former Superintendent testified that delays in schedules and progress were due to concrete and carpenter strikes and that there were also a number of extras and changes (R.A. 24), and defendant admitted that, wherever there were delays in the work, the Army Engineers gave defendant extensions of time without penalty (R.A. 26).

On or about August 18, 1955, defendant foreclosed the chattel mortgage and sold all of plaintiff's equipment for $132,575.50 at the foreclosure sale (Defendant's Answer, par. 25, R.A. 11). On or about October 13, 1955, a petition for involuntary bankruptcy was filed against the plaintiff (Complaint, par. 26, R.A. 5; Answer, par. 34, R.A. 12). Between 1955 and 1958 the Bankruptcy Court had charge of the affairs of plaintiff (R.A. 75).

This suit was brought in June of 1960 (R.A. 75) by plaintiff seeking damages for defendant's wrongful termination of the contracts (R.A. 6). Plaintiff alleged it fully performed its contracts until prevented from full and complete performance by defendant (R.A. 6). Plaintiff also argued that, if there was any default by plaintiff, defendant waived its right to terminate for that cause by failing to act with a reasonable degree of promptness after knowing of such default (R.A. 63, pars. 18, 22). In its answer defendant set up plaintiff's alleged failure "to carry proper insurance and prosecute the work with promptness and diligence" (Defendant's Answer, par. 33, R.A. 12). It also counterclaimed to recover alleged losses resulting from plaintiff's alleged breach of the subcontracts (R.A. 14).

The District Court referred the case to a master, who found that neither party is entitled to recover anything (R.A. 18, 76). The master's report (R.A. 15-18) was introduced in evidence at the trial of the case to a jury (R. 26). The jury returned a verdict for defendant on plaintiff's claim against it and found for plaintiff on defendant's counterclaim (R.A. 81). Plaintiff appealed from the ensuing judgment entered against it (R.A. 81) and from the denial of its motion for a new trial (R.A. 80).

The trial judge's complete charge to the jury is printed in the Record Appendix (R.A. 68-80). In his charge the trial judge told the jury:

> "The trustee in bankruptcy had a right to bring this action if he thought it was worth anything." (R.A. 75.) ". . . he didn't consider it worth while . . ." (R.A. 75.) ". . . the referee in bankruptcy allowed his petition and the claim was abandoned." (R.A. 75.)
>
> "Well, Mr. Wright had a right to bring this suit. If he thought that it was worth while and that the trustee in bankruptcy and the referee in bankruptcy had miscalculated the value of the suit . . ." (R.A. 75.)
>
> "And apparently, on the very eve of the closing of the statute of limitations, he filed this suit." (R.A. 75.)
>
> "The master's report is prima facie evidence of the true status of these parties. And in substance, he says neither one of them is entitled to recover anything. . . . he took into consideration all the evidence in the case, he heard this case for nine days, and counsel argued.
>
> "And this master was an officer of this court, and a lawyer. . . .
>
> "He heard the case and all the evidence and found that neither one was entitled to recover." (R.A. 76.)

"And so, I think you ought to read this master's report. . . . And while I seldom comment on the facts in the case, I think in this case that I will, and I think that the master's report indicates the proper status of these parties." (R.A. 78.)

The Court of Appeals held that—

"Although we feel that some of these remarks were unfortunate and might have been better left unsaid, in the circumstances of this case we cannot say that the parts of the charge of which plaintiff complains amount to reversible error. . . . The trial judge in a federal court may express his opinion upon the evidence, provided he tells the jury that the determination of the facts rests entirely with them. . . . This was done. . . . In view of this, and also inasmuch as the evidence of plaintiff's breach is very substantial in this case, we cannot say that the trial judge's comments on the evidence resulted in a verdict which is inconsistent with substantial justice. In so holding we repeat that we do not approve several of the trial judge's comments to the jury, and on a different record some of those comments might well constitute reversible error." (Opinion of the Court, pp. 6, 7.)

Reasons for Granting the Writ.

The trial judge in his charge told the jury that he thought the plaintiff should lose this case. ("The master's report is prima facie evidence of the true status of these parties. And in substance, he says neither one of them is entitled to recover anything. . . . I think that the master's report indicates the proper status of these parties" (R.A. 76, 78).)

The Court below held (Opinion of the Court, p. 6) that, because (*a*) the trial judge had told the jury that the determination of the facts rests entirely with them and (*b*) in that Court's opinion the evidence of plaintiff's breach was very substantial, it therefore did not find that the trial judge's comments caused a substantially unjust verdict.

1. The decision of the Court below is in conflict in principle with *Quercia* v. *United States,* 289 U.S. 466, 470, which holds that a trial judge's comments upon the evidence "should not be one-sided."

In *Quercia* v. *United States, supra,* at page 470, this Court said:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and ESPECIALLY THAT IT SHOULD NOT BE ONE-SIDED' . . ." (Emphasis supplied.)

It is respectfully submitted that the expression of opinion that plaintiff is not "entitled to recover anything" is "one-sided."

"Furthermore, in the Quercia case, 289 U.S. at page 472 . . . it is held that an error of the trial court in overstepping the bounds of its privilege to comment on the evidence is not cured by a statement in the charge that the court's opinion is only advisory and not binding on the jury."

Crowe v. *Di Manno,* 225 F. 2d 652, 655 (1st Cir.).

This "could not cure the error nor erase its effect upon the jury."

Myers v. *George,* 271 F. 2d 168, 174 (8th Cir.).

2. The decision of the Court below is in conflict in principle with *United States* v. *Murdock,* 290 U.S. 389, and *Horning* v. *District of Columbia,* 254 U.S. 135, which held that a trial judge may make a statement as to the guilt of the accused only where the facts are undisputed and the testimony of defendant himself clearly established the offense charged.

In *McBride* v. *United States,* 314 F. 2d 75 (10th Cir.) the Court said at pages 77-78:

"'This court . . . further observed that the trial judge had not commented on the evidence and had made no attempt to summarize it, and then stated: 'Rather the court was content to make a statement laying emphasis upon the heinousness of the offense charged and to express an opinion that the evidence convinced him of the guilt of the defendant beyond a reasonable doubt.'

". . . in Horning v. District of Columbia, 254 U.S. 135 . . . the United States Supreme Court considered a conviction for doing business as a pawnbroker without a license and charging more than six per cent interest. The Court stated in effect that when the facts are undisputed and the testimony of the defendant him-

self clearly established the offense charged, the judge can tell the jury that it is their duty to return a verdict of guilty. This was said in a case where it appears that the facts were undisputed, and the Supreme Court stated that on the facts submitted there was no doubt of guilt. Thus the Horning case can be taken as laying down the principle later followed in United States v. Murdock, supra, that an exceptional case where the trial court may make a statement as to the guilt of the accused is one where the facts are undisputed. The dissent by four Justices in the Horning case indicates that even under such circumstances, they felt that such a comment was not warranted because it took the case entirely out of the hands of the jury."

As the Court said in *Crowe* v. *Di Manno, supra,* at 655:

"The cases . . . are both criminal. We have no doubt, however, that the principles enunciated in them apply as well to civil cases."

In Justice Brandeis's dissent in the *Horning* case, he said at pages 139-140:

"But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. . . . What the judge is forbidden to do directly, he may not do by indirection. . . . The judge may enlighten the understanding of the jury and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority. . . .

"In my opinion, such a charge is a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury. The law which in a criminal case forbids a verdict directed 'in so many words,' forbids such a statement as the above.

"It is said that if the defendant suffered any wrong it was purely formal; and that the error is of such a character as not to afford, since the Act of February 26, 1919, c. 48, 40 Stat. 1181, a basis for reversing the judgment of the lower court. Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution, a mere formality. . . .

"Because the presiding judge usurped the province of the jury, I am unable to concur in the judgment of the court."

It is respectfully submitted that, where a trial judge informs the jury that he thinks the plaintiff is not "entitled to recover anything," he in effect directs a verdict against plaintiff.

It is respectfully submitted that there is less justification for such a statement in a civil case, where the judge has the power to direct a verdict if the evidence is undisputed and has the discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence even where the evidence is disputed.

Byrd v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 540.

But he does not have the authority to take the case from the jury where the evidence is sufficient to support a jury verdict for the plaintiff.

Gibson v. *Phillips Petroleum Co.*, 352 U.S. 874.
Dick v. *New York Life Insurance Co.*, 359 U.S. 437.

Regardless of whether the "evidence of Plaintiff's breach" appeared "very substantial in this case" (Opinion of the Court, p. 6) to the Court below and the trial judge, it is respectfully submitted that, as the evidence was disputed, plaintiff had the right to have its case submitted to the jury free of the "one-sided" opinion of the trial judge.

> "An essential characteristic of that system [the federal system for administering justice] is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."
>
> *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537.

3. The decision of the Court below is in conflict in principle with *Bollenbach* v. *United States,* 326 U.S. 607, 615, which holds that the jury function must be respected regardless of the correctness of the verdict.

It is respectfully submitted that whether or not "the trial judge's comments on the evidence resulted in a verdict which is inconsistent with substantial justice" (Opinion of the Court, p. 7) should not be the criterion for determining whether plaintiff received a fair jury trial. The miscarriage of justice alleged is not that the verdict was necessarily wrong, but that a fair jury trial was not had.

In *Bollenbach* v. *United States,* 326 U.S. 607, 615, this Court stated:

> "The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions

equal potency. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

In *United States* v. *England,* 347 F. 2d 425 (7th Cir.), at page 436, the Court said:

"We are not here concerned with the guilt or innocence of these appellants, and for that reason we have not attempted to weigh the evidence in the trial below with a view to possibly finding the error not prejudicial. Rather, we are presented here with a question going to the very heart of what we conceive to be the fair and proper administration of criminal justice. 'It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way.' Wilson v. United States, 250 F. 2d 312, 324-325 (9th Cir. 1958)."

It is respectfully submitted that the same principles apply to civil jury cases.

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."
>
> *Starr* v. *United States,* 153 U.S. 614, 626.

Where the trial judge tells the jury "The master's report is prima facie evidence of the true status of these parties. And in substance, he says neither one of them is entitled to recover anything. . . . I think that the master's report indicates the proper status of these parties" (R.A. 76, 78), these words "may prove controlling." It is respectfully submitted that, since these comments are "one-sided" (*Quercia* v. *United States, supra*), the jury verdict has not been reached after a trial according to proper legal standards and procedures, even if it cannot be established whether or not the comments proved controlling or resulted in a verdict for the defendant.

In *Wilkerson* v. *McCarthy,* 336 U.S. 53, Justice Douglas said at pages 70-71:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

It is respectfully submitted that in this case it has not been.

4. The decision of the Court below is in direct conflict with *Nunley* v. *Pettway Oil Co.,* 346 F. 2d 95 (6th Cir. 1965).

In the *Nunley* case the trial judge stated his opinion that plaintiff was a licensee and not an invitee on the defendant's premises at the time of his injury. The Court held (p. 99):

> ". . . the trial judge's opinion on the licensee-invitee issue was an opinion on an ultimate fact question peculiarly for jury consideration and amounted to an instructed verdict as to defendant Pettway Oil Company. . . . We believe the trial judge's comment on the licensee-invitee issue went beyond the limits of judicial comment and invaded the ultimate fact finding function of the jury."

It is respectfully submitted that the trial judge below went even further than the trial judge in the *Nunley* case, *supra,* as he expressed an opinion on plaintiff's entire case and not just one aspect of it, and in effect directed a verdict for defendant.

5. If the decision of the Court below is allowed to stand, it will tend to curtail the right to a jury trial.

It is respectfully submitted that the decision of the Court below seems to hold that, as long as the Appellate Court feels that the right party lost the case, the trial judge commits no reversible error when he informs the jury which party he thinks should prevail. Such comment has great weight with the jury and, unlike a light word or intimation which "may prove controlling" (*Starr* v. *United States, supra*) or "which might have the effect of prejudicing the cause" of a party (*Virginian Railway Co.* v. *Armentrout,* 166 F. 2d 400, 405 (4th Cir.)), it is respectfully submitted, amounts to an instructed verdict, invading the ultimate fact-finding function of the jury. It is respectfully submitted that, if a trial judge may go that far in his com-

ments to the jury in a case where he cannot direct a verdict, then the right to a jury trial becomes meaningless.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."
>
> *Dimick* v. *Schiedt*, 293 U.S. 474, 486.

Conclusion.

It is respectfully submitted that, for the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

LOUIS KERLINSKY,

Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6581.

CHARLES A. WRIGHT, INC.,
PLAINTIFF, APPELLANT,
v.
F. D. RICH CO., INCORPORATED,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* HASTIE* *and* MCENTEE, *Circuit Judges.*

Louis Kerlinsky for appellant.
Charles S. Cohen, with whom *Stephen A. Moynahan* and *Benjamin D. Novak* were on brief, for appellee.

OPINION OF THE COURT.

January 5, 1966.

MCENTEE, *Circuit Judge.* This is a diversity suit for breach of contract. Between February and October of 1954 plaintiff entered into a series of eleven contracts with the defendant to do certain excavation and other work at Westover Air Force Base and Hanscom Air Force Base in Massachusetts as a subcontractor for the defendant who had general contracts with the United States Government for the construction of certain facilities there. Payments under these contracts were to be made by the defendant

*Sitting by designation.

monthly on the basis of 90% of the value of the work satisfactorily completed by the plaintiff during the previous month. Plaintiff commenced the work and the defendant began making monthly payments. During the fall of 1954 plaintiff's suppliers began to complain to the defendant that they were not being paid for materials delivered. Thereupon in November, 1954 the plaintiff told the defendant that as of October 31, 1954 the amount of its indebtedness to its suppliers on these jobs (for which defendant would be liable under its contracts with the United States if plaintiff did not pay) was approximately $117,000. During this period defendant was complaining to the plaintiff that he was behind in the work. Also at or about this time defendant stopped the monthly payments on the contracts. The parties conferred with reference to the situation and on December 16, 1954, entered into another contract which was "supplementary and in addition" to the original subcontracts. As a part of this general agreement plaintiff gave defendant a promissory note for $50,000 secured by a chattel mortgage on its machinery and equipment. The supplementary agreement contained, amongst other things, an acknowledgment by plaintiff that it had not been performing its said subcontracts in accordance with their terms and that it was behind in the progress of the jobs. Thereafter, the only funds which defendant paid to the plaintiff directly were for net payroll but it did make substantial payments to plaintiff's creditors during the months of December, 1954 and also in January and February, 1955.

In early March defendant received notice that plaintiff's insurance was cancelled for nonpayment of premiums, which again focused attention on the plaintiff's financial condition. Also during the preceding months defendant continued to complain about plaintiff's lack of progress and failure to perform the work as agreed. By this time

plaintiff was in breach of its contracts [1] and after notice to the plaintiff dated March 28, 1955, the defendant took over the jobs. In mid April plaintiff was allowed to resume a portion of the work it had been doing at Westover. However, on or about June 15, 1955, defendant discharged plaintiff on this job and terminated all the contracts for failure of the plaintiff to prosecute its work with promptness and diligence and undertook to complete the work. Shortly thereafter, the plaintiff's machinery and equipment were sold at mortgagee's sale and eventually it was declared bankrupt. The trustee in bankruptcy made no claim against the defendant on these subcontracts.

Plaintiff now seeks damages for defendant's alleged wrongful termination of the contracts. In its answer, the defendant set up plaintiff's failure to pay its creditors and to perform the work with promptness and diligence as

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[1] Article VI (d) of the eleven subcontracts provides:

"Sub-Contractor shall, when requested, submit to Contractor satisfactory evidence of payment of all indebtedness incurred for material or labor under this contract. If at any time there should be evidence of any lien or claim chargeable to Sub-Contractor for which the Contractor or Owner may become liable, Contractor shall have the right to retain out of any payment due or to become due, an amount sufficient to fully indemnify Contractor or Owner against such claim or lien. Should any such claim or lien develop after payments are made, Sub-Contractor shall refund to Contractor all monies that the latter may spend in discharging such claims or lien on the premises."

Article IX (a) provides in part:

"Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or quantity, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part contained herein, Contractor shall be at liberty, . . . to terminate the employment of the Sub-Contractor for said work and to enter on the premises and take possession for the purpose of completing the work included in this contract, . . ."

agreed. It also counterclaimed to recover losses resulting from plaintiff's breach of the subcontracts. With the consent of the parties, the court referred the case to a master who found, inter alia, that plaintiff breached the contract relating to performance and payment of creditors and that defendant was warranted in terminating on those grounds; that defendant paid plaintiff or on its behalf all monies due under the contracts before they were terminated; that there was no money owed by the defendant to the plaintiff and that the defendant had no valid counterclaim against the plaintiff. The master's report was introduced in evidence at the trial of the case to a jury. The jury returned a verdict for the defendant on plaintiff's claim against it and found for the plaintiff on defendant's counterclaim. Plaintiff appeals from the ensuing judgment entered against it and from the denial of its motion for a new trial.

One of the plaintiff's assignments of error is the court's refusal to give the jury certain instructions. At the close of the testimony, plaintiff submitted fifty-one requests for instructions.[2] After the court had completed its charge plaintiff's attorney addressed the court as follows: "I would like to object and save my rights to the omission from the charge of plaintiff's requests for instructions to the jury, as follows: number 5, number 8, number 9, number 10, number 11, . . . 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, . . . 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51."

Rule 51, Fed. R. Civ. P. provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects . . .,

[2] It is a rare case where any such number of requests are required. Unnecessary requests interfere with orderly procedure by creating extra work for the district court and this court. Furthermore, they may serve to obscure a party's real intentions, the opposite of their proper purpose.

stating distinctly the matter to which he objects and the grounds of his objection, . . ."

In commenting on this rule this court has said:

"The object of this rule is to afford the trial judge an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge. The rule also serves to lessen the potential burden of appellate courts by diminishing the number of rulings at the trial which they may be called upon to review." *Marshall* v. *Nugent,* 222 F.2d 604, 615 (1st Cir. 1955).

In *Palmer* v. *Hoffman,* 318 U.S. 109, 119, (1943), our Supreme Court said:

"In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

The above stated general objection made by plaintiff's attorney in this case was hardly of practical assistance to the court. It did not state distinctly the matter to which he objected and the grounds of his objection as required by the rule. The objection was not "sufficiently specific to bring into focus the precise nature of the alleged error" and failed to show the court "distinctly" which of the large number of requests had not been substantially embodied in the charge. *Marshall* v. *Nugent, supra; Sears* v. *Southern Pacific Company,* 313 F.2d 498 (9th Cir. 1963); *Johnson* v. *Chesapeake and Ohio Railway Company,* 227 F.2d 858 (7th Cir. 1955); *cf. Chernack* v. *Radlo,* 331 F.2d 170, 172

(1st Cir. 1964). Thus, the plaintiff did not properly preserve its objections for review.

Notwithstanding this noncompliance with the rule, our examination of the charge leads us to the conclusion that the jury was fully instructed upon the material issues in this case and under the circumstances the trial court's refusal to give plaintiff's requested instructions was not reversible error.

Plaintiff also contends that the trial judge in his charge made certain remarks which were prejudicial to the plaintiff. Specifically it objects to the court telling the jury that it thought "the master's report indicates the proper status of these parties"; that the trustee in bankruptcy did not see fit to bring this action and that the plaintiff brought this suit just before the statute of limitations had run. He contends that in making these latter remarks the court implied the plaintiff had "a poor case." Although we feel that some of these remarks were unfortunate and might have been better left unsaid, in the circumstances of this case we cannot say that the parts of the charge of which plaintiff complains amount to reversible error.

The fairness of a charge cannot be determined by considering only a portion of it out of context. On appeal, the charge must be examined as a whole and portions of it will not be scrutinized apart from their content as isolated verbal phenomena. *Goodyear Fabric Corporation* v. *Hirss,* 169 F.2d 115 (1st Cir. 1948). The trial judge in a federal court may express his opinion upon the evidence, provided he tells the jury that the determination of the facts rests entirely with them. *Cf. MacKnight* v. *United States,* 263 Fed. 832, 838 (1st Cir. 1920), cert. denied, 253 U.S. 493. This was done. At the outset of the charge the court told the jury: "The facts I will leave to you, with probably some comment, and your decision on the facts is final. . . ." Later in the charge, the court told the jury: "And so, I

think you ought to read this master's report. You have a right to reject it, because you are the last judges of the equities of this case." In view of this, and also inasmuch as the evidence of plaintiff's breach is very substantial in this case, we cannot say that the trial judge's comments on the evidence resulted in a verdict which is inconsistent with substantial justice. In so holding we repeat that we do not approve several of the trial judge's comments to the jury, and on a different record some of those comments might well constitute reversible error.

Nor do we agree that it was error to admit the master's report into evidence. His findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury. Fed. R. Civ. P. 53(e)(3). See *Ex parte Peterson,* 253 U.S. 300 (1920); *Shima* v. *Brown,* 133 F.2d 48, 49 (D.C.C.A. 1943), cert. denied, 318 U.S. 787; *Cabel* v. *United States,* 113 F.2d 998, (1st Cir. 1940). Both parties consented to the court's order of reference to the master and agreed that the master's findings were not to be final and plaintiff cannot now object to the order of reference. The master's report was treated merely as an item of evidence which was entitled to such weight as the jury in its best judgment would accord it.

Plaintiff's difficulties in this case really arose from the fact that the master's report contained certain conclusions of law. It was not good practice for the master to state conclusions of law when his report was not to be considered final and was to be read to the jury. The only purpose in providing that the report shall not be final is to present findings to a jury which may be supplemented or contradicted by further evidence at the trial so that the jury can decide the case on the entire factual picture with rulings of law to be made by the court. However, the plaintiff having consented to the form of the reference, it cannot now complain.

Also, at the trial counsel for the plaintiff attempted to question the treasurer of the plaintiff corporation as to the content of a conversation which took place at the December 16 meeting of the parties. This conversation which was offered to vary the amount, time and conditions of payment by the defendant to and for the plaintiff, took place at the same time the "supplementary" written agreement, the chattel mortgage and the promissory note were executed. Plaintiff contends that the court's exclusion of testimony as to the content of this conversation was reversible error.

It is well settled in Massachusetts that "where a writing shows on its fact that it includes the whole agreement of the parties and comprises all that is necessary to constitute a contract, it is presumed that they have placed the terms of their bargain in this form to prevent misunderstanding and dispute, intending it to be a complete and final statement of the whole transaction." *Glackin* v. *Bennett,* 226 Mass. 316, 115 N.E. 490, 491 (1917); *Berman* v. *Geller,* 325 Mass. 377, 90 N.E. 2d 843 (1950). To modify, enlarge, or vary the terms of an integrated document by this conversation would have violated the parol evidence rule. Clearly the final agreement of December 16, 1954, which incorporated the eleven subcontracts, was intended to be a complete expression of all the transactions between the parties. It unequivocally identified the parties and their respective obligations, and recited the consideration. Thus, the trial court rightly excluded the testimony as to the conversation in question.

All other points raised have been considered and have been found to be without substance.

Affirmed.

JUDGMENT

January 5, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Enter:

ALDRICH, CH. J.

By the Court:

ROGER A. STINCHFIELD
Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1179.

CHARLES A. WRIGHT, INC.,
Petitioner,
v.
F. D. RICH CO., INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals (R. 173-180) is reported at 354 F. 2d 710.

Jurisdiction.

The judgment of the Court of Appeals (R. 81) was entered on January 5, 1966. A timely petition for rehearing, filed on February 18, 1966, was denied on March 1, 1966 (R. 189). The petition for writ of certiorari was filed on April 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether a Federal District Court judge committed prejudicial error in expressing his opinion upon the evidence even though he stated several times in his charge to the jury that the facts are to be determined solely by the jury, whose decision on the facts would be final.

Statement of the Case.

On June 10, 1960, the petitioner (plaintiff) instituted a suit in the United States District Court for the District of Massachusetts against the respondent (defendant) to recover damages for the alleged breach by the defendant of eleven contracts between the parties (R.A. 2). Jurisdiction in the District Court was based on diversity of the parties, the petitioner being a Massachusetts corporation and the respondent a Connecticut corporation.

The facts stated by the Court of Appeals (Appendix, pp. 17-19) are undisputed here (see Petition, "Question Presented," p. 2) and set forth clearly and adequately the underlying background of this case.

Briefly these facts were:

Between February and October of 1954 the plaintiff and the defendant entered into a series of eleven contracts wherein the plaintiff, as a subcontractor, was to perform certain excavation and concrete work for the defendant, which was the general contractor on a project to construct certain facilities for the United States Government at Westover Air Force Base and Hanscom Air Force Base (R.A. 7-8, 27).

During the course of the work the plaintiff's suppliers began to complain of non-payment, and, in November of 1954, the plaintiff informed the defendant that, as of October 31, 1954, the plaintiff was indebted to suppliers in the

amount of $117,000 and that, under its contract with the United States, the defendant would be liable for the non-payment of suppliers by the plaintiff. As a result, the defendant stopped making the monthly progress payments which were required by the terms of the contract.

Thereafter both parties conferred and a supplementary agreement was entered into. As part of the agreement the plaintiff gave the defendant a promissory note for $50,000, secured by a chattel mortgage on machinery and equipment. The agreement contained an acknowledgment by the plaintiff to the effect that it had not been performing the work in accordance with the terms of the subcontracts and that it was behind in the progress of the jobs.

Subsequently the plaintiff continued to make substantial payments to the plaintiff's creditors and to pay the plaintiff's payroll costs, but did not make monthly progress payments. The defendant continued to complain about the plaintiff's lack of progress, and in March, after receiving notice that the plaintiff's insurance was cancelled for non-payment of premiums, the defendant took over the work under the eleven contracts after notice to the plaintiff. In mid-April the plaintiff was allowed to resume a portion of the work as to certain of the eleven contracts. However, on June 15, 1955, the defendant finally terminated all further contracts with the plaintiff.

Thereafter the plaintiff's machinery and equipment were sold at a mortgagee's sale; and, in October 1955, the plaintiff was declared a bankrupt. The trustee in bankruptcy made no claim against the defendant on the subcontracts.

The plaintiff's suit, filed on June 10, 1960, five years after the events, sought damages for the defendant's alleged breach of the eleven contracts. The defendant denied any liability and counterclaimed for $304,943.01, being the cost to the defendant for completing the plaintiff's subcontracts above the subcontract prices (R.A. 14).

With the consent of the parties the matter was referred to a master, who found that the plaintiff had breached its contracts relating to performance and payment of creditors; that the defendant owed no moneys to the plaintiff; and that the defendant had no valid counterclaim against the plaintiff (Court of Appeals Opinion, Appendix, p. 20).

The master's report was introduced in evidence at the trial of the case to the jury (R.A. 15). The jury returned a verdict for the defendant on the plaintiff's complaint and a verdict for the plaintiff on the defendant's counterclaim (R.A. 81).

The District Court, Chief Judge Sweeney sitting, in charging the jury, stated, *inter alia* (R.A. 68-80):

> "The facts I will leave to you, with probably some comment, and your decision on the facts is final." (R.A. 68.)
>
> "Now you have heard this case, and it is now ended, or will be when you have brought in your verdict. Of course, your verdict will be in accordance with the evidence that you have heard here, plus the exhibits, which will be given to you, plus any logical inferences that are to be drawn from either the testimony or the exhibits.
>
> "The thing that will be most important to you is your own common sense, the same common sense that you use every day." (R.A. 69.)

Since one of the issues in the case involved the fact that the plaintiff had been a bankrupt and that the trustee in bankruptcy had abandoned any claim against the defendant, the trial Court explained the bankruptcy and the actions of the trustee (R.A. 74-75). The trial Court charged the jury that—

". . . The trustee in bankruptcy had a right to bring this action if he thought it was worth anything. And according to the court records he petitioned leave of the referee in bankruptcy to abandon this claim because he didn't consider it worthwhile, and the referee in bankruptcy allowed his petition and the claim was abandoned." (R.A. 75.)

The trial Court then instructed the jury on the law, stating:

"Well, Mr. Wright had a right to bring this suit. If he thought that it was worthwhile and that the trustee in bankruptcy and the referee had miscalculated the value of the suit, then the thing reverted to him . . . and it was something that he could prosecute himself if he wanted to." (R.A. 75.)

The trial Court also explained the function of the master before whom the matter had initially been heard with the consent of the parties (R.A. 76). The trial Court stated that, even though the master had rendered a report which was part of the evidence, the parties to the action, ". . . in the last analysis, . . . have a right to trial by jury, and that is what plaintiff is claiming" (R.A. 76). The Court then pointed out that the master's report was "prima facie evidence of the true status of the parties," and that his finding was that neither party was "entitled to recover" (*ibid.*).

Then the trial Court stated that—

"Well, the plaintiff has a right to show that even he was wrong. And his duty is still to convince you by the preponderance of the evidence that he has a right to recover, which means that the master was wrong." (R.A. 76.)

"And so, I think you ought to read this master's report. You have a right to reject it, because you are the last judges of the equities in this case. And while I seldom comment on the facts in the case, I think in this case that I will, and I think that the master's report indicates the proper status of the parties." (*Ibid.*)

The plaintiff appealed the decision to the Court of Appeals, alleging, *inter alia,* that comments by the trial judge in its instructions to the jury were prejudicial to the plaintiff. The Court of Appeals sustained the judgment of the District Court, holding that—

"The fairness of a charge cannot be determined by considering only a portion of it out of context. On appeal, the charge must be examined as a whole and portions of it will not be scrutinized apart from their content as isolated verbal phenomena. . . . [Citing case.] The trial judge in a federal court may express his opinion upon the evidence, provided he tells the jury that the determination of the facts rests entirely with them. . . . [Citing case.] This was done." (Court of Appeals Opinion, Appendix, p. 6.)

Argument.

The sole issue raised by the plaintiff in its petition is the fairness of the trial Court's charge to the jury. Such an issue will only in the most aggravated cases present this Court with the "special and important reasons" for exercising its discretion to review on a writ of certiorari a lower Court's determination (see Rule 19 of the Rules of this Court).

Clearly, the jurisdiction of this Court cannot be invoked by taking the words of a judge's charge out of context and

then parading them as an exhibit of horrors. This is precisely what the petitioner has attempted to do (see Petition, pp. 6-7). The quotes from the charge are fragmented, juxtaposed and edited so that the petitioner claims that the trial Court instructed the jury that "plaintiff should lose this case" (Petition, p. 7).

A reading of the entire charge makes it clear, as the Court below concluded, that the judge's comments on the evidence were tempered by his repeated reminders that the jurors were "the last judges of the equities of this case" (Court of Appeals Opinion, Appendix, p. 23).

It is well established that in the Federal Court a trial judge has the prerogative of commenting upon the evidence and expressing his opinions provided that such comments or expressions do not amount to what, in effect, would be an invasion of the province of the jury. This principle has been followed and reiterated by the various Appellate Courts, including the First Circuit. *MacKnight* v. *United States,* 263 Fed. 832, 839 (C.C.A. 1, 1920); cert. den. 253 U.S. 493. *Crowe* v. *Di Manno,* 225 F. 2d 652 (C.A. 1, 1955). *Franano* v. *United States,* 310 F. 2d 533, 537 (C.A. 8, 1962). *National Dairy Products Corporation* v. *United States,* 350 F. 2d 321, 333-334 (C.A. 8, 1965).

A federal trial judge is not a "mere moderator" of the facts, and can express his opinion if he does so "fairly, impartially and accurately," and makes it clear that his comments are only advisory and that all matters of fact "are for [the jury's] determination and theirs alone." *Crowe* v. *Di Manno,* 225 F. 2d 652, at 655. This is the rule of conduct long established by this Court. *Quercia* v. *United States,* 289 U.S. 466, 469.

Appellate Courts will not reverse or disturb a trial judge's comments unless those comments completely and wholly constitute an invasion of the jury's province.

In *Quercia* v. *United States, supra,* this Court ruled that the trial judge had in fact committed prejudicial error. An examination of that opinion reveals that the trial judge had not reviewed the testimony given by the defendant, who had taken the witness-stand, but merely referred to the defendant's testimony and had stated, as to the defendant, that "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." *Quercia* v. *United States, supra,* at p. 468.

In *United States* v. *Murdock,* 290 U.S. 389, 393, the defendant was indicted on a wilful refusal to give testimony and to supply information as to deductions claimed in his income-tax returns. After refusing the defendant's request to instruct the jury regarding the defendant's good-faith belief in refusing to answer, the Court stated:

> " '. . . The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt.' "

In a decision involving the condemnation of an automobile, the Court advised the jury, after it had been out for some time and had come back for additional instructions, that in his opinion the government should prevail, but added that his opinion was merely advisory. The Court concluded that the trial judge in a Federal Court has the prerogative of commentary on the "weight of the evidence" if the jury is advised that the comments are only advisory, and found no error. *One Buick Automobile* v. *United States,* 275 F. 809, 811 (C.C.A. 8, 1921).

The petition here does not raise any question as to the propriety of the master's report itself, for this report was consented to by the plaintiff (see Court of Appeals Opin-

ion, Appendix, p. 23), and the petition raises no question as to its propriety or inclusion as evidence.

The sole question, then, is the propriety of the judge's comments, and it is submitted that those comments are well within the permissible range established by the decisions. While it is unnecessary, as the Court below stated, to "approve" of each of the judge's comments, nonetheless "substantial justice" was done (Court of Appeals Opinion, Appendix, p. 23).

Conclusion.

The decision of the Court of Appeals is clearly correct. There is neither a conflict of decisions nor a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's supervisory powers. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1179.

CHARLES A. WRIGHT, INC.,
Petitioner,

v.

F. D. RICH CO., INC.,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of May 31, 1966, denying the petition for writ of certiorari herein, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed April 2, 1966, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of this Court's order of May 31, 1966, this Court had not yet handed down its decision in *Sheppard* v. *Maxwell,* October Term, 1965, No. 490, decided on June 6, 1966.

It is respectfully submitted that the decision of the Court below is in conflict in principle with *Sheppard* v. *Maxwell.*

In the *Sheppard* case the question was whether a party was deprived of a fair jury trial because of the trial judge's failure to protect him sufficiently from influences outside of the evidence affecting the jury.

While in the *Sheppard* case the outside influence was from publicity, in this case the outside influence was the opinions of the trial judge himself, a much more potent force on the jury.

While in the *Sheppard* case sources outside the courtroom were expressing the opinion that Sheppard should not prevail, in this case it was the Court itself which expressed the opinion that Wright should not prevail.

While in the *Sheppard* case there was a question of whether or not the entire jury had heard or considered the outside influence, in this case there was little question that the jury had both heard and considered the statements of the trial judge.

While in the *Sheppard* case it was outside influences which added to and distorted the evidence, in this case it is respectfully submitted the additions and distortions came from the bench itself.

In the *Sheppard* case the Court of Appeals was reversed "despite the absence of any showing of prejudice" and without requiring "a showing of identifiable prejudice to the accused," even though the jury had been instructed concerning their duties. In this case, however, the Court of Appeals below did not reverse, because the jury had been instructed concerning their duties and because it could not say that prejudice had resulted. The Court below made it clear that "on a different record some of those comments might well constitute reversible error" (Appendix to Petition for Certiorari, p. 23). It is respectfully submitted that the Court below did not reverse in this case because it believed that "a showing of identi-

fiable prejudice" was required. It is further respectfully submitted that "a showing of identifiable prejudice" should not be required in this type of case, for the same reasons it was not required in the *Sheppard* case.

In the *Sheppard* case this Court referred to *Estes* v. *Texas,* 381 U.S. 532 (1965), for the grounds for dispensing with a showing of actual prejudice. That case (at pp. 543-544) cited with approval the language of Mr. Justice Black for the Court in *In re Murchison,* 349 U.S. 133 (1955), that " '. . . our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U. S. 11, 14.' . . . And, as Chief Justice Taft said in *Tumey* v. *Ohio,* 273 U. S. 510, almost 30 years before: '. . . Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' At 532. (Emphasis supplied.) This rule was followed in *Rideau* [373 U. S. 723, 726 (1963)], and in *Turner* v. *Louisiana,* 379 U. S. 466 (1965). In each of these cases the Court departed from the approach it charted in *Stroble* v. *California,* 343 U. S. 181 (1952), and in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and *White* v. *Maryland,* 373 U. S. 59 (1963), we applied the same rule, although in different contexts. . . . Such untoward circumstances as

were found in those cases are *inherently bad and prejudice to the accused was presumed.*" (Emphasis added.)

Mr. Chief Justice Warren, whom Mr. Justice Douglas and Mr. Justice Goldberg joined in concurring, wrote at p. 578: "A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was *substantial evidence* to support his conviction aside from the confession, *Payne* v. *Arkansas* [356 U. S. 560, emphasis added]; that the jury refrained from making a clear-cut determination on the voluntariness question, *Jackson* v. *Denno* [378 U. S. 368]; that a particular judge was swayed by a direct financial interest in his conviction, *Tumey* v. *Ohio* [273 U. S. 510]; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner* v. *Louisiana* [379 U. S. 466]."

It is respectfully submitted that a party likewise is unable to prove that he was actually prejudiced by one-sided comments of a trial judge. He cannot demonstrate their effect or lack of effect on the jury.

Under our system of law, the decisions of disputed questions of fact are for the jury. It is for the jury and not the judge to determine the credibility of the witnesses and their testimony.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States,* 153 U.S. 614, 626.

"This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of

opinion upon the evidence 'should be so given as not to mislead, and *especially that it should not be one-sided*' . . ." *Quercia* v. *United States,* 289 U.S. 466, 470 (emphasis added).

It is respectfully submitted that one-sided expressions of opinion by a trial judge, such as those in this case, that the plaintiff is not "entitled to recover anything," are "received with deference" by the jury and "may prove controlling," and, since they are not just "his lightest word or intimation," are probably controlling. What the jury would have decided in the absence of the trial judge's comments is pure conjecture. Neither the parties nor the trial judge nor the appellate judges could know which witnesses and testimony the jury found to be credible, and therefore could not know which evidence was substantial. It seems fair to assume that a trial judge who "seldom comment[s] on the facts" (R.A. 78) would not have attempted to influence the jury against a party by one-sided comments unless he thought there was a good possibility that that party would prevail. The party himself would not be likely to prosecute the action and the appeal, with the effort and expense involved, if he did not believe he could prevail.

It is respectfully submitted that, where the comments of a trial judge to a jury are one-sided in favor of one party to an action, there is "the probability of unfairness." *In re Murchison, supra,* at 136. The jury then decides the case, not just on the basis of the evidence, but while affected and greatly influenced by the opinions of the judge, particularly where, as here, the judge does not explain the reasons for his opinion, but simply states them on his own authority. It is respectfully submitted that a jury trial where the judge openly favors one party against the other is neither fair nor does it seem fair. It seems most

unfair to say that the jury and not the judge is to decide the facts free of outside influence yet to permit the jury to be influenced by the judge's opinion on the ultimate decision to be made by the jury. This Court has held even a reference to a master as an invasion of a jury's province: "Even this limited inroad upon the right to trial by jury ' "should seldom be made, and if at all only when unusual circumstances exist." ' *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 258. *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469, at 478 (1962). Where both the master and the judge state their opinion that one party should not prevail, it is most unlikely that a jury will disagree. Where a trial judge adds to the evidence[1] and distorts it[2] and expresses a one-sided opinion upon the evidence,[3] then the rule that "justice must satisfy the appearance of justice" (*Offutt* v. *United States, supra,* at 14), is not being observed.

Where a juror is informed by the trial judge that in his opinion one party should prevail, then there is a "possible temptation to the average man . . . to forget the burden of proof required . . . [and] might lead him not to hold the balance nice, clear and true between" the parties. *Tumey* v. *Ohio,* 273 U.S. 510, 532. The jury is tempted not

---

[1] "The Trustee in bankruptcy had a right to bring this action if he thought it was worth anything" (R.A. 75). "The Trustee may properly waive any claim to property when assertion of a claim would involve the estate in expensive litigation with a doubtful outcome" (4 Collier on Bankruptcy, § 70.42, note 4, p. 1333).

[2] "And apparently, on the very eve of the closing of the statute of limitations, he filed this suit" (R.A. 75). The records show that the action was not brought on the eve of the closing of the statute of limitations (R.A. 75).

[3] "The master's report . . . says neither one of them is entitled to recover anything. . . . I think that the master's report indicates the proper status of these parties" (R.A. 76, 78).

to consider the evidence at all, but simply to rely on the experience, knowledge and authority of the judge.

In such circumstances, as in the *Sheppard* case, it is respectfully submitted that a reversal should be ordered without requiring "a showing of identifiable prejudice."

2. It is respectfully submitted that the decisions of this Court as well as the decisions of the Courts of Appeals, are in conflict on the question of whether "a showing of identifiable prejudice" is required in cases of judge's comments to the jury.

In *Bihn* v. *United States*, 328 U.S. 633, 639 (1946), in reversing a conviction, the Supreme Court ruled that the trial judge's comment in the instructions to the jury "Did she steal them? Who did if she didn't?" was prejudicial. The Court stated (pp. 638-639): "'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.' . . . We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government."

It is respectfully submitted that, while there was a question in the *Bihn* case as to whether the judge's comments were actually prejudicial at all in the context in which they were spoken, the requirement of an affirmative showing of

prejudice in this case conflicts with the presumption of prejudice in the *Sheppard* case. It is respectfully submitted that the Court could not determine whether the "scales were quite evenly balanced," even after taking the time to review the entire record, unless it assumed the functions of the jury and attempted to determine from "the dead record" the credibility of the witnesses and the testimony and the weight to be given them. It is further respectfully submitted that, even where the scales are weighed against a party, he should still be entitled to the same fair trial as when the scales are equal or in his favor. He should have the absolute right to a fair trial regardless of whether he has a strong or a weak case.

It is respectfully submitted that the requirement of affirmative prejudice in the *Bihn* case, *supra,* and in the Court below conflicts with the holding in *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, at 409: "A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."

Despite the *Bihn* case, the Seventh Circuit Court of Appeals, in *United States* v. *England,* 347 F. 2d 425 (1965), at p. 436, stated: "We are not here concerned with the guilt or innocence of these appellants, and for that reason we have not attempted to weigh the evidence in the trial below with a view to possibly finding the error not prejudicial." (Note 18. "This apparently was the course taken in United States v. Rainone [192 F. 2d 860, 2d Cir. 1951], and Neeper v. United States [93 F. 2d 409, 8th Cir. 1937]. Statement to this effect is found in Schwachter v. United States [237 F. 2d 644.]" The Ninth Circuit is also in agreement with the Seventh Circuit on not attempting to weigh the evidence to determine if identifiable prejudice affirmatively appears from the whole

record. *Wilson* v. *United States,* 250 F. 2d 312, 324-325 (1957).

3. It is respectfully submitted that the decisions of this Court as well as the decisions of the Courts of Appeals are in conflict on the limitations on the privilege of trial judges to comment on the facts.

In *Quercia* v. *United States,* 289 U.S. 466, at p. 470, this Court said: "This Court has . . . emphasized the duty of the trial judge to use great care that *an expression of opinion upon the evidence 'should . . . not be one*-sided . . .'" (Emphasis added.)

Yet in *United States* v. *Murdock,* 290 U.S. 389 (1933), the Court said at page 394: "*Although the power of the judge to express an opinion as to the guilt of the defendant exists,* it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. [Emphasis added.] *Horning* v. *District of Columbia,* 254 U.S. 135."

The *Murdock* and *Quercia* cases, *supra,* evidently overruled such cases as *Simmons* v. *United States,* 142 U.S. 148, 155 (the judge stated he regarded the testimony of guilt convincing), and *United States* v. *Philadelphia & Reading Railroad Co.,* 123 U.S. 113 (the judge stated: "you should not . . . find for the plaintiff").

Yet it is respectfully submitted that the effect of and the line drawn by the *Quercia* and *Murdock* cases is not clear, and there have been no recent cases of the United States Supreme Court in this area, although numerous petitions for certiorari have been filed.

In *Cooke* v. *Liberty Mutual Fire Insurance Co.,* 239 F. 2d 597 (8th Cir. 1957); cert. den. 353 U.S. 937, the trial judge stated his opinion that defendant was not guilty of contributory negligence. This was held proper.

In *Nunley* v. *Pettway Oil Co.,* 346 F. 2d 95 (6th Cir. 1965), the trial judge stated his opinion that the plaintiff was a licensee and not an invitee. This was held an invasion of the "ultimate fact finding function of the jury" and reversible error because "We believe the trial judge's comment on the licensee-invitee issue went beyond the limits of judicial comment" (at p. 99).

In *Virginian Railway Co.* v. *Armentrout,* 166 F. 2d 400 (4th Cir. 1948), the trial Court in his charge informed the jury of his opinion concerning the defendant's negligence. The Court in reversing said at page 405: "It was proper, of course, for the judge to array the evidence and comment upon it; but what the law envisions in this regard is judicial comment fairly explaining to the jury the contentions of the parties with respect to the evidence . . . The judge occupies a position of great influence with the jury . . . he should be careful not to . . . say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts."

In *Franano* v. *United States,* 310 F. 2d 533 (8th Cir. 1962), that Court said at pages 537-538: "A survey of cases indicates that reviewing courts are hesitant to reverse a judgment due to an allegedly unfair comment within the charge to the jury unless the trial judge clearly became argumentative and assumed the role of an advocate. . . . As stated by our court in Cook v. United States, supra, 18 F. 2d 50 at 52, and reiterated in numerous cases since then: '* * * we think the line of demarcation between what a court may say to the jury in a criminal case in expressing his opinion on the facts, and what he may not

say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts, and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant . . ."

It is respectfully submitted that the "line of demarcation" needs clarification at this time.

4. The question presented by this case is one of large practical importance.

The privilege of a trial judge to comment on the facts in every jury trial in the Federal Courts is a privilege which has been prohibited in Massachusetts and many other states by statute. The dangers to the conduct of a fair jury trial of permitting such a privilege may outweigh any benefits of such a privilege unless its limitations are clear to both the bench and the bar. There have been innumerable cases in the lower Federal Courts where the fairness of the judge's comments has been questioned and there probably were more cases where the question arose but was not appealed. It is respectfully submitted that a party is unlikely to feel that he has had a fair jury trial where the judge makes known to the jury from the bench how he thinks the case should be decided and lends the weight of his office to one side in the litigation against the other. Equal justice requires that the judge not lend his authority by his comments to any party to a case, regardless of how substantial or insubstantial, strong or weak, that case is. There is little need for him to aid the party who has a substantial, strong case; nor should he attempt to influence a verdict against him. He is required by our system of justice to leave the case to the jury no matter how the scales are balanced unless he may direct a verdict.

It is respectfully submitted that there is little need at all for the judge to comment on the facts in a civil jury case, as he has the authority to order a new trial after a verdict if he feels that the verdict is against the weight of the evidence. Rather than to attempt to influence the jury in arriving at its verdict and thus making the submission of the case to the jury a one-sided sham, the trial judge in a civil case, it is respectfully submitted, should await the jury verdict and then set it aside if he feels a miscarriage of justice has resulted. Even though this will necessitate a new trial, it seems far better than to hold out the right to have a case decided by a jury of one's peers, if that right actually exists, only when the trial judge chooses to let the jury decide the case free of his comments on the facts.

5. The decision of this case should clarify the boundaries of the judge's privilege to comment on the facts, as this is an extreme case, where the judge informed the jury precisely how he thought the case should be decided in very clear language.

6. If the decision of the Court below is allowed to stand, then at least in the First Circuit a trial judge by his comments will be able, in effect, to direct a verdict though there is evidence to take the case to the jury, where the Court of Appeals determines from the "dead record" that the jury was unlikely to have believed the losing party's witnesses and testimony. It is respectfully submitted that it is not for the Appellate Court to attempt to assume the functions of a jury and determine the credibility of witnesses and testimony from the record. It is further respectfully submitted that it is impossible for an appellant to prove that he was actually prejudiced by the judge's

comments, as he has no way of proving what influenced the jury in arriving at its decision. *Estes* v. *Texas, supra.* In cases where the trial judge's comments add to the evidence, distort it and express a one-sided opinion, it is respectfully submitted that prejudice should be presumed and a new trial granted. *Sheppard* v. *Maxwell, supra.*

When a trial judge makes unfair comments to a jury, there is no fair trial. When such unfair trials are permitted by a Federal Court of Appeals, does not justice demand action by the Supreme Court of the United States?

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the First Circuit.

Respectfully submitted,
LOUIS KERLINSKY,
Counsel for Petitioner.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

LOUIS KERLINSKY,
Counsel for Petitioner.